83-968

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHARLES STORNIOLO,

Petitioner,

vs.

GINA KAREN FISHING, INC., A Corporation, PACECO, INC., A Corporation, ARTHUR DEFEVER, An Individual, ARTHUR DEFEVER, INC., A Corporation, MORRIS GURALNICK ASSOCIATES, INC., a Corporation,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GERALD H. B. KANE, JR.
A Law Corporation
270 Portofino Way, #304
Redondo Beach, CA 90277
(213) 379-4904

JEFFREY B. HARRISON
A Law Corporation
401 Shatto Pl., Ste 100
Los Angeles, CA 90020
(213) 386-5786

Attorneys for Petitioner

QUESTIONS PRESENTED

The issues presented herein are

(1) Whether the presumption of prejudice long recognized by this Court in cases of improper communication between court and jury is applicable where a court officer sua sponte gives a demonstration and answers juror questions during a viewing of the scene of an accident, and where these communications occur not only without the consent of the parties and their counsel but also effectively outside their presence.

(2) Whether notions of waiver should be applied to deny appellate review to a claim of prejudicial misconduct by an officer of the court where the affected party has taken reasonable,

if unsuccessful, efforts to prevent and to protect himself against such irregularity, where the irregularity has resulted in a serious miscarriage of justice, and where in any event the law specifically dispenses with the requirement of an objection to such irregularity.

TOPICAL INDEX

TABLE OF AUTHORITIES

Federal Statutes

No._____

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1983

CHARLES STORNIOLO,

Petitioner,

vs.

GINA KAREN FISHING, INC., A Corporation, PACECO, INC., A Corporation, ARTHUR DEFEVER, An Individual, ARTHUR DEFEVER, INC., A Corporation, MORRIS GURALNICK ASSOCIATES, INC., a Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner Charles Storniolo respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the case of Storniolo v. Gina Karen Fishing, Inc., et., et al., 9th Cir. No. 81-5605.

OPINION BELOW

The memorandum opinion of the Court of Appeals is reproduced in Appendix A to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1983. (See Appendix A.) This Petition for Writ of Certiorari is filed within ninety days of that date. (28 U.S.C. §2101(c).) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY OR CONSTITUTIONAL PROVISIONS INVOLVED

The principal statutory provisions are the Jones Act (46 U.S.C. §688), and 28 U.S.C. §1333. Also involved is the Court Reporter Act (28 U.S.C. §753). These provisions are set out in pertinent part in Appendix B hereto.

STATEMENT OF THE CASE

A. Factual Background

The accident out of which this action arises occurred on August 16, 1977, when Petitioner Charles Storniolo, a commercial fisherman in his mid twenties, slipped and fell approximately 15 feet while descending a ladder between the upper engine room deck and the lower engine room deck on the fishing vessel, Gina Karen. Storniolo was acting in the course and scope of his employment as a seaman at the time of the accident, having just commenced his first working day aboard the vessel only minutes before. Storniolo had never been on the subject ladder prior to the fall and had never been below the vessel's main deck. Storniolo believed the cause of his fall to have been a slippery substance on the second or third step of the ladder. Storniolo sustained severe and permanent injuries in the fall, including a broken back.

B. Proceedings Below

1. Storniolo brought suit in the United States District Court for the Southern District of California against his employer, Gina Karen Fishing, Inc., alleging causes of action under the Jones Act (46 U.S.C. §§ 688,) and under the doctrine of unseaworthiness. He also sued Paceco, Inc., builder of the vessel, and Arthur Defever, Arthur Defever, Inc., and Morris Guralnick Associates, Inc., designers of the vessel, on theories of negligent design, negligent construction and strict liability in tort.[1/] Prior to trial, the case was bifurcated, with the issue of liability to be tried separately.

2. At trial of the issue of liability, which was before a jury, Storniolo sought to show unseaworthiness and negligence against the Gina Karen

---

[1/] The several defendants pursued a third party action among themselves which is not involved in this Petition.

by establishing the presence of a slippery substance on the subject ladder and the absence of a non-skid surface on the ladder's steps and also by showing improper design and construction of the ladder. Storniolo's case against the remaining defendants focused on negligent and unsafe design and construction of the ladder. The defendants contested Storniolo's showing and in addition sought to establish that Storniolo had been negligent in descending the ladder with his back to it (even though this is a common nautical practice), particularly in light of his unfamiliarity with the vessel, and that his negligence had been the sole or principal cuase of the accident.

3. From the first day of trial, April 14, 1981, the question of a viewing of the ladder and the vessel by the jury was a subject of discussion and dispute.

a. The subject first arose when counsel for the Gina Karen moved for a viewing.

[RT 36.] After some discussion of the need for a viewing [RT 41-52], the trial judge ruled that there could be a viewing with limiting instructions if all counsel stipulated that the jury be accompanied by a magistrate and a reporter. The judge further ruled that the viewing would be of the accident ladder alone, and not other areas of the vessel, and that for safety reasons, among others, the jurors would not be permitted to use the ladder. [RT 52-56.] All counsel stipulated to this procedure. [RT 56.] Counsel for Storniolo then indicated his objection to the taking of any testimony out of the presence of the trial judge, even if a reporter were present. The trial judge agreed with this and ordered that the only communication to occur at the viewing was to be the reading of a prepared statement to the jury. [RT 56-57.]

b. The subject next came up on the morning of April 15, 1981, when the trial judge asked if a reporter was actually needed during

the viewing. When counsel for Storniolo indicated his desire that a reporter be present, the trial judge stated that Storniolo would have to pay for the reporter's time. Counsel for Storniolo expressed some doubt about whether Storniolo should be required to pay and asked for time to consult the applicable rules, in which request the court apparently acquiesced. At this point, the trial judge indicated that the magistrate selected to supervise the viewing was one "Bosun" McCue, and that the magistrate had been told of the plan to supply him with a pre-agreed statement to read to the jury at the scene. [RT 87-88.] This discussion was resumed at noon recess that same day, the judge repeating her earlier statement that Storniolo must pay for the reporter if he wanted one present and suggesting that a reporter would not be "necessary if we have this script that Magistrate McCue will read." Storniolo's counsel insisted in response that he wished to read the applicable rules before committing himself.

[RT 168-169.] Counsel for the Defever defendants then urged that the presence of a reporter might actually encourage undesired conversation and that an appropriate alternative would be to dispense with the reporter and to admonish everyone to remain silent during the viewing. [RT 169.] Counsel for Storniolo agreed with this proposal and all counsel stipulated to forego a reporter on the express understanding that the only oral communication at the viewing would be in the form of the reading of the previously approved script and in addition that all crew members would be kept clear of the area of the ladder during the viewing. [RT 170-171.]

c. On the morning of April 17, 1981, the procedure for the viewing was extensively discussed and at length decided upon. [RT 548-599; 565-566.] In the course of these discussions, the trial judge indicated counsel should meet and prepare the statement to be read by Magistrate McCue, said statement to incorporate all evidentiary

matters to be brought to the attention of the jurors during the viewing and such instructions as that they descend the accident ladder (which turned out to be the only means of reaching the lower engine room) while facing it. [RT 559; 566.] During these discussions, counsel for the Gina Karen several times requested that a crew member be allowed to demonstrate the customary manner of descending the ladder, with his back to it, which request was opposed by counsel for Storniolo and denied by the court on the basis that it would be difficult if not impossible to duplicate the conditions which had existed at the time of the accident. [RT 551-553; 556; 565.]

d. Later, at noon recess that same day, counsel met with the judge in chambers to work out the content of the statement to be read by the magistrate. [RT 678-688.] The statement, as finally settled upon, provided as follows:

> "The ladder above [sic] is the ladder upon which Mr. Storniolo fell. It leads to the lower engine room. You will now descend the ladder face toward the ladder. Note the tape on the floor at the base of the ladder. You are free to look around the engine foom, also, for the relative position of the diesel engines, the electrical panel, the floor plates with finger holes, and other component parts about which you have heard testimony."

[RT 687-688.] At this time, the court prescribed the sequence in which the viewing party would descend the ladder, and ordered that counsel and any parties parties present were to remain on the upper deck to avoid any crowding below, [RT 688-689.]

e. At the end of the court session on April 17, 1981, the trial judge advised the jury that the viewing was to take place and explained the purpose of the viewing. The judge indicated that the viewing would be presided over by "Judge McCue," as the judge identified the magistrate. [RT 795-797.] At this point, it was again reaffirmed that the magistrate would be given a copy of the statement which he would

read during the viewing. [RT 796, 798-799.]

f. The viewing was held as scheduled on the morning of April 21, 1981 [RT 801-804], but it was not held according to plan by any means. While on the vessel, the magistrate, a colorful character with an apparently extensive nautical background, as suggested by the out-of-court sobriquet "Bosun" McCue [RT 87-88], departed from the carefully scripted procedure in several significant particulars:

(1) He refused to read the prepared statement to the jury, instead delivering his own extempore interpretation thereof;

(2) He gave a demonstration of descending the ladder with his back to the ladder, as Storniolo had done; and

(3) He had a running conversation with the jurors and answered their questions while effectively

outside the presence of counsel and the parties, who were standing on the upper engine room deck and could not clearly hear what was being said over the sound of the engines. [CR 119; 125; RT 805-806.]

g. Immediately upon returning to court from the viewing, counsel for Storniolo brought the magistrate's departure from the script to the court's attention, stating as follows:

> "Mr. Harrison: The magistrate had conversations with members of the jury, out of earshot of counsel. In terms of the actual written statement, it was not read. He somewhat ad libbed. There were questions that were asked. I heard some explanations to some of the questions and not as to others. We were up above in the upper engine room, so we were not able to really completely hear all of what was said.
>
> I know he did nothing intentionally malicious to anybody for any reason, but I am concerned that he may have made statements. I am concerned that he did make statements that should be stricken from the Jury's

minds with respect to what they consider as evidence.

Additionally, he gave a demonstration on the descending of the ladder, which, you know, counsel -- he just did it. In response to a question somebody said -- one of the jurors said, 'Now, is it safer to go down backwards or forwards?' And he started to answer, and I summoned him up, and I explained to him that the reason -- that all he was to say was the reason they were going down the way they were was by order of the court, period, and it was for their own safety, and he went down, and he came back up, and he did a number down the ladder.

I don't know what he said. I'm not sure what all went on. I now, in retrospect, wish I did take the court reporter. That is my fault, not yours. I guess, for the record, I should move for a mistrial, on the grounds that evidence has been taken out of the presence of the court by the jury. I don't know what it's -- the problem is I don't know if its prejudicial."
[RT 805-806.]

To this the court responded that counsel had adequately preserved his record and that the court would take the matter under submission until counsel had been able to speak with the court's law clerk, who had been present at

the viewing as a bailiff. [RT 806-807.]

h. At a conference in chambers at the start of the afternoon session, counsel advised the court that the law clerk had not seen or heard what had transpired at the foot of the ladder, and that the motion for mistrial would be withdrawn, "[b]ut I would like an admonition. . ." [RT 868.] Following further discussion of the problem, the court stated that

> ". . . I think we can put a cautionary in there, that they could consider what they saw in the engine room, and their observations of the stairs in question, but any comments that might have been made that they overheard from any source are not to be considered as evidence."

[RT 869.] This proposed solution drew the assent of all counsel. [RT 869.]

i. Subsequently, when jury instructions were discussed and settled upon, the meat and sinew of the proposed admonition were unaccountably left out [RT 1279-1223], so that instead of being told specifically to ignore all that

Magistrate McCue had said, the jury was told merely that

> "Anything you may have seen or heard outside the court room is not evidence and must be entirely disregarded. An exception to this is the visit which you took to the Gina Karen. As to this, you may consider that which you observed aboard the vessel."
> [RT 1789.]

Believing that he had already adequately made his record on the point, counsel for Storniolo did not raise a formal objection when the court asked, before the jury retired, whether counsel had any objections not previously noted. [RT 1818.]

4. Ultimately, the jury returned a defense verdict [CR 118], and judgment was entered thereon [CR 124].

Storniolo moved for a new trial on the basis, inter alia, that he had been prejudiced by the irregularities which occurred during the viewing. In support of his motion Storniolo introduced the declarations of his counsel who

indicated that although counsel had personally reviewed the ground rules with Magistrate McCue before the jurors had boarded the vessel, including the manner in which the ladder was to be descended and the necessity for sticking to the prepared text, Magistrate McCue had not read the statement and had begun a virtual nonstop dialogue with the jurors from the moment all were assembled on the lower deck, evidently answering juror questions and volunteering information not contained in the prepared statement; that the magistrate had ignored counsel's objections and attempts to presuade him to adhere to the scenario; that in response to a juror question about the safest way to descend the ladder, the magistrate had given a demonstration of descending with his back to the ladder; and that the magistrate's running commentary continued even after the jury had ascended to the main deck. [CR 119, pp. 3-8; CR 125, pp. 15-17.]

In opposition, the Gina Karen introduced the declaration of its counsel, who admitted that Magistrate McCue had descended the ladder with his back to it and that Magistrate McCue had not read the prepared statement. Counsel stated, however, that he had not heard a juror ask nor had he heard Magistrate McCue say which way was the safest way to descend the ladder. He further indicated that none of the conversation in the lower engine room had been audible and that counsel for Stroniolo had not, to his observation, objected to any of the proceedings. [CR 122, pp. 1-5.]

Storniolo's motion for a new trial was denied. [RT 1845-1855.]

5. An appeal was taken to the Ninth Circuit Court of Appeals [CR 131], which held in an unpublished memorandum opinion filed on September 12, 1983, that the misconduct of the magistrate was not presumptively prejudicial, and that Storniolo had failed to sustain his

burden of establishing prejudice; that in any event Storniolo had waived the issue by withdrawing his motion for mistrial; and that the absence of a reporter's transcript of the viewing did not alter the situation, since Storniolo had waived the presence of a reporter. (See Appendix A.)

6. The District Court had jurisdiction of the cause pursuant to the Jones Act (46 U.S.C. §§ 688), and 28 U.S.C. §1333. The Court of Appeals had jurisdiction of the appeal under 18 U.S.C. §1291.

REASONS FOR GRANTING THE WRIT

A. The Controlling Decisions of This Court Require That a Presumption of Prejudice Be Indulged Where There Is Improper Communication Between Court and Jury. The Decision of the Court of Appeals Represents an Erosion of This Salutory Principle, Requiring the Intervention of This Court

The leading case on the subject of improper communication between court and jury is Fillippon v. Albion Vein Slate Co. (1919) 25 U.S. 76. In that case, which involved a supplemental jury instruction given without notice to the parties of their counsel and in their absence, this Court stated as follows:

> "We entertain no doubt that the orderly conduct of a trial jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict. Where a jury has retired to consider their verdict, and supplementary instructions are required, either because

> asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present . . . . In this case the trial court erred in giving a supplemental instruction in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction. . . ."
> (250 U.S., at p. 81.)

The Court later went on as follows:

> "And, of course, in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless."
> (250 U.S., at p. 82; emphasis added.)

Fillippon was a civil case, but the holding therein, including the requirement that a presumption of prejudice be indulged, has been followed in numerous subsequent cases, both civil and criminal, and in a variety of factual contexts. (See, e.g., United States v. Burns (CA 7th, 1982) 683 F.2d 1056, 1058-1059; Standard Alliance Ind. v. Black Clawson Co. (CA 6th, 1978) 587 F.2d 813, 828-829; Blue Bird Body Co. v. Ryder

Truck Rental (CA 5th, 1978) 583 F.2d 717; Petrycki v. Youngstown & Northern Arco (CA 6th, 1976) 531 F.2d 1363, 1366-1368; United States v. Gay (CA 6th, 1975) 522 F.2d 429, 435; Rice v. United States (CA 8th, 1966) 356 F.2d 709; 716-717; Wheaton v. United States (CA 8th, 1943) 133 F.2d 522, 527.)

Indeed, this Court has itself subsequently followed Fillippon and applied it in criminal cases, some quite recent. (United States v. United States Gypsum Co. (1978) 438 U.S. 422, 459-462; Rogers v. United States (1975) 422 U.S. 35, 38; (see also Shields v. United States (1927) 273 U.S. 583.)

In addition, a number of cases have applied the Fillippon rationale to situations involving other communications than ex parte supplemental instructions during deliberations. (See e.g., Remmer v. United States (1954) 347 U.S. 227 [apparent offer of bribe to juror); Mattox v. United States (1892) 146 U.S. 140, 148-150 [comments of bailiff, newspaper article];

Krause v. Rhodes (CA 6th, 1977) 570 F.2d 563; cert. den. 435 U.S. 924 [threats on life of juror]; Richardson v. United States (CA 5th, 1966) 360 F.2d 366 [conversation between government witness and juror]; United States v. Harry Barfield Company (CA 5th, 1966) 359 F.2d 120 [president of defendant corporation in tax case engaged in social conversation with jurors during trial]; United States v. Gersh (CA2d, 1964) 328 F.2d 460 [anonymous phone calls to juror]; Texas & New Orleans Railroad v. Underhill (CA 5th, 1956) 234 F.2d 620 [comments of courtroom spectator]; Paramount Film Distributing Corp. v. Applebaum (CA 5th, 1954) 211 F.2d 188 [jury considered manual not received in evidence].) Many of these cases, and others as well, are collected in Government of Virgin Islands v. Gereau (CA 3d, 1975) 523 F.2d 140, 150-154, as instances of "extraneous influence" which present a sufficiently high potential for prejudice that they are considered prima facie prejudicial, so that the

burden on the issue of prejudice rests on the responding party, not the complaining party.

Notwithstanding the foregoing, the portion of the Fillippon holding which establishes the rebuttable presumption of prejudice where improper communication has occurred has been disregarded by various Courts of Appeals in favor of a test of prejudice which purports to be based on Rule 61 of the Federal Rules of Procedure and which places the burden of establishing prejudice on the complaining party, at least in civil cases. (See, e.g., Skill v. Martinez (CA 3rd, 1982) 677 F.2d 368; Lyons v. Rainier Mfg. Co. (CA 9th, 1979) 594 F.2d 1236, 1237; Dixon v. Southern Pacific Transp. Co. (CA 9th, 1978) 579 F.2d 511, 513-514; Charm Productions, Ltd. v. Travelers Indem. Co. (CA 7th, 1973) 489 F.2d 1092, 1095-1096, cert. den. 416 U.S. 986.) The cases just cited seem to proceed on the theory that the existence of a presumption of prejudice is somehow inconsistent with the requirement of

Rule 61 that error have a substantial effect on the rights of the litigants before a reversal is ordered. In truth, there is no such inconsistency. As this Court observed in McCandless v. United States (1935) 298 U.S. 342, 347-348, a statutory provision requiring that judgment on review be given "without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties," just as Rule 61 now requires, did not change "the well settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial. United States v. River Rouge Co., 269 U.S. 411, 421; Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 82; Williams v. Great Southern Lumber Co., 277 U.S. 19, 26." [Emphasis in original.]

In addition, the cases which disregard the presumption of prejudice seem to treat improper

judge-jury communications as merely a routine irregularity, not meriting any special attention. In Dixon v. Southern Pacific Transp. Co., supra, 579 F.2d 511, 513-514, fn.2, for example, one of the cases on the basis of which the presumption of prejudice was held unavailable to Storniolo, it was stated that

> "[T]here is no reason to treat [improper judge-jury communication] differently than other types of unconstitutional errors in the administration of civil trials."

We think this blithe pronouncement ignores a number of telling considerations. For one thing, if any single person embodies the authority of the law in the eyes of a jury it is the judge or magistrate who presides at the trial. Of all the participants in the trial, the judge is the person whose statements and observations are most likely to be accepted without question by the jurors. When, therefore, a judge (or, as in this case, a magistrate acting as the judge's appointed surrogate) undertakes to give evidence

in the form of a demonstration and answers to jurors' questions, as occurred herein, or merely to supply supplemental instructions, it is inevitable that what he says and does will carry great weight with the jury. In addition, when such communication occurs outside of the presence of the parties and their counsel great difficulty is certain to be encountered in reconstructing what has happened and in assessing its likely effect where only a partial record is made of the communication (see, e.g., United States v. Burns, supra, 683 F.2d 1056, 1058-1059) and a fortiori where, as here, there is no record of the communication available (see United States v. United States Gypsum Co., supra, 438 U.S. 422, 461-462; United States v. Gay, supra, 522 F.2d 429, 433-435). As observed in United States v. Burns, supra, 683 F.2d 1056, 1058-1059, in a slightly different but analogous context:

> "Two important interests are undermined by private discourse between judge and jury during deliberations.

> First, it gives rise to "Star Chamber' implications which detract from the appearance of justice. Second, it absolutely precludes the parties from making a record as to the context in which the judge's remarks were made, thereby thwarting appellate review. . . . An additional concern in this particular case is the risk that the judge will be drawn into an extended discourse with the jury, thereby disturbing the delicate balance of legal principles set forth in the original instructions. . ."

Because Fillippon has never been overruled or limited by this Court (indeed, as seen above, its holding has quite recently been reaffirmed), because it represents a salutary precedent which deserves perpetuation, and because the line of cases relied on by the Court of Appeals herein disregards the principles of Fillippon and creates conflict and confusion in the law, it is respectfully submitted that an authoritative reiteration of the true rule is urgently needed. This is not a matter of mere form or sterile technicality. Rather it is a matter of vital importance to the fair administration of justice.

B. Fundamental Fairness and Sound Public Policy Compel the Conclusion That There Was No Waiver of the Magistrate's Misconduct as a Ground of Appeal

There is a distinctly "Catch-22" quality to the Court of Appeal's determination that Storniolo waived any and all right to raise on appeal the issue of the magistrate's misconduct.

Storniolo's difficulties began with the District Court's announcement that Storniolo would have to pay for a reporter if he wanted one present at the viewing. This was plainly contrary to law. The Court Reporter Act requires that an official court reporter record verbatim all proceedings in civil cases and it requires, further, that the government compensate said court reporters. (28 U.S.C., §753(b) and (e).) Wishing to avoid this additional expense and having been offered a means of protecting his client without the need for a reporter, counsel for Storniolo did indeed waive the presence of

a reporter at the viewing, as the cases indicate it was within his power to do. (See, e.g., United States v. Piascik (CA 9th, 1977) 559 F.2d 545.) Nonetheless, in so doing, counsel by no means consented to what ensued, any more than counsel in United States v. United States Gypsum Co., supra, 438 U.S. 422, 460-461, having acquiesced in the trial judge's ex parte conference with the jury foreman solely to determine the cause of apparent juror confusion, consented to the judge's delivery of a demand for a verdict "one way or the other." Quite the contrary, the elaborately choreographed procedures so laboriously worked out between counsel and the court were specifically designed to prevent anything like the free-wheeling demonstration and question-and-answer session put on by the magistrate.

The second waiver, and the one which is most relevant for present purposes, was a direct consequence of the first. The very eventuality having happened which counsel and the court

had striven to avoid, and the absence of a reporter and the placement of counsel and observers during the viewing having made it impossible to reconstruct precisely what occurred, counsel for Storniolo had only one practical choice. His motion for mistrial had little real chance of success, since the record necessary to support it was lacking. Under the circumstances, the sole means of salvaging the situation, even partially, was an admonition to the jury to disregard Magistrate McCue's remarks. Counsel therefore abandoned the mistrial motion, but only on the clear understanding that a proper and effective admonition would be given.

Once again, however, counsel's reasonable expectations were frustrated, for the admonition ultimately given completely failed to indicate that the magistrate's words and deeds were to be disregarded. The end result was that the jury had before it, and was left entirely free to consider, prejudicial evidence of precisely the kind

counsel had labored heroically from the outset to keep out of the case.

It may perhaps be debated whether counsel preserved his record with the degree of force and clarity which might be wished, but in truth, this was one of those cases in which there was little that could be done to prevent probable serious prejudice, short of declaring a mistrial, which would, of course, have necessitated the very retrial now sought. Since the main purpose of timely objections is to permit prompt resort to such remedies and palliatives as may be available, so that retrial may be avoided, it follows that where no effective remedy is available and where the error causes a manifest miscarriage of justice, there should be no overly punctilious insistence on mere form. (See Citron v. Aro Corporation (CA 3d, 1967) 377 F.2d 750, 753; Pritchard v. Liggett & meyers Tobacco Company (CA 3d, 1965) 350 F.2d 479, 486, cert. den. 382 U.S. 987.) As this Court observed in Hormel v.

Helvering (1941) 312 U.S. 552, 557, in discussing a similar waiver issue:

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Ordinary rules of procedure do not require sacrifice of the rules of fundamental justice."

Moreover, Rule 605 of the Federal Rules of Evidence provides that "[t]he judge presiding at the trial may not testify in that trial as a witness" and that "[n]o objection need be made in order to preserve that point." As one commentator has noted, this rule applies "whenever the judge testifies, including those instances where the judge testifies without ever being called by a party and where the judge effectively assumes the role of a witness without ever taking the witness stand. [Emphasis added.]" (Graham,

Handbook of Federal Evidence (West, 1981), §605.1.) And the rule beyond any question encompasses a magistrate temporarily presiding in the place and stead of the judge. (See Kennedy v. Great Atlantic & pacific Tea Co. (CA 5th, 1977) 551 F.2d 593 [Presiding judge's law clerk within scope of rule].) If no objection whatsoever is required, it is difficult to see how in law or logic a defective objection or a withdrawn objection can give rise to a waiver. Nonetheless, the decision of the Court of Appeals herein in effect so holds.

CONCLUSION

This case prsents issues of the first importance not only to the parties to this lawsuit but to litigants generally. Traditionally, the courts, including this Court, have been scrupulous to protect juries against extraneous influences such as improper communications from the trial

judge, and they have recognized that the potential for prejudice when such improper communications occur is altogether too great for ordinary standards of review to apply. The decision of the Court of Appeals herein and the cases on which that decision relies constitute a significant departure from that traditional approach. The willingness of the Court of Appeals to find a waiver of this point likewise runs counter to firmly established principles of law. Counsel took all reasonable steps to protect his record, and even if he did not, this case involves an egregious miscarriage of justice of the sort the courts have consistently held justifies review of points not properly preserved by appropriate objection. Moreover, the Federal Rules of Evidence specifically dispense with any need to make any objection to what amounts to testimony by a judicial officer in a case in which he is presiding.

Because these issues are of such importance and because the manner in which the Court of

Appeals has treated them threatens a serious erosion of principles carefully enunciated by this Court, it is respectfully urged that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

GERALD H. B. KANE, JR.

JEFFREY B. HARRISON

Attorneys for Petitioner

APPENDIX A

NOT FOR PUBLICATION

FILED
SEP 12, 1983

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES STORNIOLO, Plaintiff-Appellant, vs. GINA KAREN FISHING, INC., a corporation, et al, Defendant-Appellee.	NO. 81-5605 D.C. No. CV 78-0601-K
GINA KAREN FISHING, INC., a corporation, Third Party Plaintiff-Appellant, vs. PACECO, INC., a corporation, et al, Third Party Defendant-Appellees	No. 81-5709 D.C. No. CV 78-0601-K MEMORANDUM

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, District Judge, Presiding
Argued and submitted, June 6,1983

Before: PREGERSON and NELSON, Circuit Judges,
and CORDOVA* District Judge

Appellant, plaintiff below, brought an action for injuries he sustained while serving as a seaman on the fishing vessel Gina Karen. After trial by jury, a verdict was returned in favor of all defendants. The trial court denied a motion for new trial and plaintiff here appeals. We affirm.

Appellant first contends that the conduct of a magistrate who accompanied the jury on a visit to the vessel Gina Karen is grounds for a new trial. Appellant has made no showing how he was prejudiced by the alleged misconduct of the magistrate. Assuming that the magistrate's conduct was improper, the court does not agree with appellant's argument that all improper judge-jury communications are presumptively prejudicial. Skill v. Martinez, 677 F.2d 368 (3rd Cir. 1982);

---

* The Honorable Valdemar A. Cordova, United States District Judge for the District of Arizona, sitting by designation

Dixon v. Southern Pacific Transportation Co., 570 F.2d 511 (9th Cir. 1978).

In any case, the court does not find it necessary to rule on that issue. The record reveals that appellant made a motion for mistrial based on the magistrate's alleged misconduct and then withdrew the motion. By withdrawing the motion for mistrial, appellant abandoned or waived any objections he may have had because of the alleged misconduct. A party may not fail to pursue an objection to alleged error during the trial as a matter of trial strategy and then seek a new trial because of the error. Porterfield v. Burlington Northern, Inc., 534 F.2d 142 (9th Cir. 1976).

Appellant claims error because of the absence of a court reporter on the jury's visit to the Gina Karen. The record, however, shows that appellant validly waived the reporter's presence.

Appellant next claims that the circumstances surrounding the qualified expert instructions gave rise to reversible error. The court finds that the

trial court's qualified expert instruction was correct and that any error occasioned by the trial court's altering the instruction after closing argument was harmless.

Appellant also argues that the trial court erroneously gave a laches instruction. Appellant is correct that the three year Jones Act limitation is the analogous period, Bush v. Oceans International, 621 F.2d 207 (5th Cir. 1980), and that the existence of laches is a question for the court, Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982). However, the trial court did not decide if a verdict on laches would be binding or merely advisory. Instead, the trial court found that the jury's verdict on the merits of the liability claim mooted the issue. In so doing, the court did not commit reversible error.

Finally, the alleged combination of errors below did not deny appellant a fair trial.

AFFIRMED

Consolidated Case No. 80-5709:

The trial court correctly found that Gina Karen's third party complaint for indemnity was made moot by the jury's verdict in favor of defendants of liability.

AFFIRMED.

APPENDIX B

ADDENDUM

46 U.S.C. §688 provided as follows at the times relevant hereto:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

28 U.S.C. §1333 provides as follows:

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize."

28 U.S.C. §753 provided in pertinent part as follows at the times relevant hereto:

"(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augumented by electonic sound recording subject to regulations promulgated by the Judical Conference: (1) all proceeding in criminal cases had in open court; (2) all proceedings in other cases had in open court

unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding. The Judicial Conference shall prescribe the types of electronic sound recording means which may be used by the reporters....

* * *

(e) Each reporter shall receive an annual salary to be fixed from time to time by the Judicial Conference of the United States. All supplies shall be furnished by the reporter at his own expense."

No. 83-968

IN THE

Supreme Court of the United States

October Term, 1983

CHARLES STORNIOLO,

Petitioner,

vs.

GINA KAREN FISHING, INC., a Corporation; PACECO, INC., a Corporation; ARTHUR DEFEVER, an Individual; ARTHUR DEFEVER, INC., a Corporation; MORRIS GURALNICK ASSOCIATES, INC., a Corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF IN OPPOSITION.

LILLICK, MCHOSE & CHARLES,
DONALD F. WOODS, JR.,
707 Wilshire Boulevard,
Los Angeles, Calif. 90017,
(213) 620-9000,
Attorneys for Respondent,
Gina Karen Fishing, Inc.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 83-968

IN THE

Supreme Court of the United States

October Term, 1983

CHARLES STORNIOLO,

Petitioner,

vs.

GINA KAREN FISHING, INC., a Corporation; PACECO, INC., a Corporation; ARTHUR DEFEVER, an Individual; ARTHUR DEFEVER, INC., a Corporation; MORRIS GURALNICK ASSOCIATES, INC., a Corporation,

Respondents.

BRIEF IN OPPOSITION.

Statement of the Case.

Storniolo brought this action for personal injuries against Gina Karen Fishing, Inc., owner of the tuna boat GINA KAREN, under the Jones Act and general maritime law. Storniolo claimed he fell down the engine room ladder while the vessel was tied to the dock in San Diego Harbor on August 16, 1977. Storniolo also sued Paceco, Inc., Arthur DeFever, Arthur DeFever, Inc., and Morris Guralnick Associates, Inc., the builders and designers of the vessel and the ladder for negligence and products liability.

The jury returned a verdict in favor of all defendants, with a special finding that Storniolo was 100% contributorily negligent. This conclusion was reached after a great deal of evidence was submitted by all sides — not only that the

ladder was perfectly safe in design and construction, and in maintenance on the day of the accident, but also that the only explanation for plaintiff's accident was his own carelessness.

As to design and construction, GINA KAREN called Pasquale LoCoco, a part owner of the vessel and an experienced, licensed Chief Engineer. He testified that he had served on the GINA KAREN continuously since its launching in 1969 and that to his knowledge the ladder had been traversed each year a minimum of approximately 12,000 times under both calm and adverse weather conditions, with *no* accidents occurring. R.T. 962-65. LoCoco testified it was his opinion the ladder was safe and reasonably fit to use on the day of the accident, R.T. 967, and as a part owner and as the person who used the ladder the most, if it had not been safe he would have changed it. R.T. 1046-47. GINA KAREN also called Captain Brian Smith, a marine surveyor with 19 years experience in surveying tuna boats, such as, the GINA KAREN. He testified he had surveyed the vessel and her ladder after each and every one of her fishing trips, R.T. 813, and, based on his experience, found it perfectly safe, and not in need of any modifications to tread surface or ladder angle as suggested by Storniolo. R.T. 820-56.

Paceco, Guralnick and DeFever presented witnesses to substantiate the safety of the ladder in design and construction in a more technical way. Morris Guralnick, a graduate of M.I.T. and a naval architect and marine engineer with over 50 years of experience [R.T. 1222-23], testified that the ladder was safe as to angle and tread surface. R.T. 1229-44. Guralnick also explained why alternative tread surfaces were unsafe or at least were not as good as the present tread surface. R.T. 1244-47. Thomas Wilson, another naval architect with a Bachelor of Science degree from the U.S.

Naval Academy who, in his 28 years of experience, participated in the design of three of the world's largest warships [R.T. 1220], testified that the ladder was perfectly safe as to angle and tread surfaces. R.T. 1183-91. DeFever himself, another naval architect, testified the ladder angle was safe. R.T. 1144-45. Finally, Captain Bowman, a retired U.S. Coast Guard Captain, testified the angle of the ladder was perfectly safe. R.T. 1175.

By contrast, Storniolo managed to bring forth one "expert," Fred Cady who specializes in accident reconstruction. R.T. 384. Cady freely admitted he had no experience in matters maritime, including naval architecture or design, and had never been aboard a vessel, such as, GINA KAREN prior to being retained by Storniolo. R.T. 504-07. Although he had great difficulty qualifying to testify as to *any* opinions, R.T. 384-485, he was allowed to offer several unfounded ideas and opinions, over strenuous objection, as to why the ladder should be considered defective. As a purported basis for his conclusions, Cady testified as to certain "coefficient of friction" tests he had run on exemplars of diamond tread and other treads. R.T. 400-11. The actual steps on GINA KAREN were of diamond tread composition and painted with a blue deck paint. Cady admitted he had not run any tests on the actual steps. R.T. 511-13.

Solely to refute the conclusions of Mr. Cady, as opposed to legitimizing Cady's "qualifications" as an expert, GINA KAREN called registered safety engineer [R.T. 1055] Ron Doss, a veteran of many accident investigations aboard tuna vessels. R.T. 1055-56. Doss testified he had run coefficient of friction tests similar to those run by Cady, except that Doss had performed his tests on the actual step surfaces, R.T. 1061, and had used actual tennis shoes, R.T. 1059-61, similar to those worn by Storniolo in order to better simulate the dynamics of the actual accident. Cady used

little rubber patches. On the basis of his experience, safety standards in the field, and his own tests, Doss concluded and testified that the ladder was safe in all respects, including tractive quality. R.T. 1072-73.

Importantly, Doss testified that even using Cady's figure for the coefficient of friction of his "exemplar," Doss would not change his opinion as to the safety and tractive quality of the ladder. R.T. 1073. Both Cady and Doss testified the higher the coefficient, the better the tractive quality. Cady had found a .46 coefficient of friction for his exemplar's painted diamond tread [R.T. 410], while Doss found coefficients of friction in the range of .56 to .68 in his tests on the actual painted treads. R.T. 1062-64. Doss pointed out that the coefficient of friction is .2 to .25 for a dance floor, .35 to .4 for the average grocery store floor, and .45 to .65 for sidewalks and roadways. R.T. 1067. Also, the National Bureau of Standards in 1941 published a set of standards which indicated that anything above a .4 coefficient for rubber soles is classified as "good" tractive quality. R.T. 1067-68. Thus, Doss testified that Cady's coefficient of .46 was a good figure for this tread surface and application.

As to the maintenance of the ladder on the day of the accident, the record is absolutely devoid of any evidence of a foreign substance on the steps which caused Storniolo to fall. Storniolo himself admitted he saw no grease or oil. R.T. 219. LoCoco denied seeing any grease or oil on the steps, despite traversing them several times that morning before Storniolo came aboard. R.T. 944. Nor did he see any grease or oil on the steps right after the accident, despite traversing them again to summon help. R.T. 948-49. The two police officers/paramedics, Officers Rundberg and Sergott, who rendered aid to Storniolo, denied seeing any grease or oil, despite thoroughly checking for it on the ladder steps. R.T. 746-47, 772-73. The officers were looking for oil and

grease not only because Storniolo said he had slipped on the steps, R.T. 774, but also because they wanted to keep their gurneys and uniforms clean, R.T. 749-50, 775, and because they wanted to avoid slipping while attempting to remove Storniolo. R.T. 750, 776-77. Officer Rundberg testified that he even examined the soles of Storniolo's shoes to see if there was any grease or oil or other foreign substance on them, and found none. R.T. 774-76.

The best Storniolo could offer in this regard was his own testimony that he "slipped" and the testimony of a friend, Gaspare Catanzaro, that he, Catanzaro, had gone to the top of the ladder shortly after the accident, descended two or three steps, then "slipped," and returned to the top of the ladder. R.T. 644. Even Catanzaro had to admit he saw no grease or oil or any other foreign substance. R.T. 645. He also admitted he did nothing further about the fact he had slipped, such as checking to see if there was anything on the steps that caused him to slip. R.T. 645. And, even though his friend had just fallen down the ladder and others would be going up and down the ladder to get him out, Catanzaro did not bring the "slipperiness" to the attention of others.

That this accident would not have occurred but for Storniolo's own negligence and his negligence alone, cannot seriously be disputed. Storniolo consciously and deliberately chose to descend a ladder he had never seen or been on before, R.T. 219, in light his eyes were adjusting to, R.T. 235, without his prescription glasses, R.T. 235-36, carrying a wrench in his right hand instead of his pocket, R.T. 218-19, 234, facing away from the ladder, *i.e.* going down backwards, R.T. 219, 269-70, on shoes with rounded heels [Ex. A-6]. By these conscious acts of Storniolo, the prescription for disaster, unfortunately, was filled.

With an understanding of the overwhelming evidence the jury had before it in favor of defendants, the sophistry of Storniolo's attempt to overturn the verdict based on the alleged misconduct of the jury view is revealed. The jury view requested by GINA KAREN, and agreed to by Storniolo after his counsel had a chance to inspect the condition of the ladder at the time of trial, was intended to allow the jurors to see the ladder in context. After all, Storniolo had commissioned the construction of a "mock-up" ladder which was large, but "not to scale" or "representative," and had it prominently displayed in the courtroom throughout the trial. R.T. 380-82, 673-76. It was used as a "prop" in many situations and for demonstrations by counsel and witnesses to the jury [*e.g.*, R.T. 526-28]. The jury view allowed the jury to see the actual ladder in its natural setting for a short one-half hour, so that they could have more of the actual evidence with which to decide the case.

ARGUMENT.

I.

A Magistrate's Unrecorded Communications With the Jury Are Not Presumed Prejudicial.

Plaintiff claims that the magistrate's unknown comments during the jury view were prejudicial. However, after the jury view and during the trial, plaintiff made no effort to ascertain by a special hearing outside the presence of the jury what the magistrate did or said. Plaintiff could have examined the magistrate himself, any of the marshals who attended the jury view, the opposing attorneys, and/or the jurors as to their recollection of what was said and done. Instead, plaintiff elected to waive the alleged impropriety and proceed with the trial. Now following an adverse verdict, plaintiff seeks to raise the issue.

Until 1919, it was the practice that any error at trial required a reversal unless the party opposing the reversal could "affirmatively demonstrate from other parts of the record that the error was harmless." *Haywood v. United States*, 268 F. 795, 798 (7th Cir. 1920). However, by legislation that year, 40 Stat. 1181 [the harmless error rule], Congress changed the practice to require "that the complaining party show to the reviewing tribunal from the record as a whole that he has been denied some substantial right whereby he has been prevented from having a fair trial." *Haywood v. United States*, 268 F. 795, 798 (7th Cir. 1920). Citing with approval the *Haywood* analysis, this Court in *Berger v. United States*, 295 U.S. 78, 82, 55 S.Ct. 629, 631, 79 L.Ed. 1314, 1318 (1935), stated:

> "Evidently Congress intended by the amendment of §269 [the harmless error rule] to put an end to the too rigid application, sometimes made, of the rule that error being shown, *prejudice must be presumed*; and to es-

tablish the more reasonable rule that *if, upon an examination of the entire record, substantial prejudice does NOT appear, the error must be regarded as harmless.*" (Emphasis added.)

The House of Representatives' Committee Report states that the purpose of the rule was " 'to cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights, otherwise they are to be disregarded.' H.R. Rep. No. 913, 65th Cong. 2d Sess. 1." *Kotteakos v. United States*, 328 U.S. 750, 760, 66 S.Ct. 1239, 1246, 90 L.Ed. 1557, 1564 (1946).

The present wording of the harmless error rule continues the original purpose of the rule by requiring affirmance of all judgments *unless* there is evidence of prejudicial conduct. The statute reads:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, *unless refusal to take such action appears to the court inconsistent with substantial justice*. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." F.R.C.P. 61. (Emphasis added.)

The case relied upon by petitioner for his presumption of prejudice argument was tried by the District Court and heard by the Third Circuit Court of Appeals before the enactment of the harmless error rule in 1919 and during the period when any error was presumptively prejudicial. *Fillipon v. Albion Vein Slate Co.*, 242 F. 258 (3d Cir. 1917), *rev'd*, 250 U.S. 76, 39 S.Ct. 435, 63 L.Ed. 853 (1919). Secondly,

although the Supreme Court's *Fillipon* opinion was released within three months after congressional enactment of the harmless error rule, the Supreme Court neither cited nor discussed the new rule. Finally, and more significantly, the erroneousness and prejudicial effect of the ex parte judicial communication involved in *Fillipon* were *not* presumed because the ex parte statement was in writing and preserved for review where the Supreme Court found (not presumed) the statement to be prejudicial error. Here, unlike *Fillipon*, petitioner wants the Court to presume the unknown statements were harmful.

Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), is more analogous to this case than *Fillipon*. In *Palmer* one of plaintiff's witnesses testified on cross-examination that he had given a signed statement to one of plaintiff's lawyers. When the defendant's attorney asked to inspect the statement, the court ruled that the door would be opened by such inspection for plaintiff to offer the statement in evidence; thus, defendant declined to inspect it. The defendant contended that the ruling was reversible error. However, this Court stated:

> "We do not reach that question [namely, whether the ruling was erroneous]. Since the document was not marked for identification and is not a part of the record, *we do not know what its contents are*. It is therefore impossible, as stated by the court below, to determine whether the statement contained remarks which might serve to impeach the witness. Accordingly, we cannot say that the ruling was prejudicial even if we assume it was erroneous. Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court. [February 26, 1919] 40 Stat. 1181, c. 48, 28 U.S.C.A. §391. *He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of*

> *showing that prejudice resulted.* That burden has not been maintained by petitioners." 318 U.S. at 116, 63 S.Ct. at 482, 87 L.Ed. at 651. (Emphasis added.)

Although *Palmer* dealt with an unrecorded statement of a witness, the same analysis has been applied to ex parte judicial comments. *See e.g., Rogers v. United States*, 422 U.S. 35, 40, 95 S.Ct. 2091, 2095, 45 L.Ed.2d 1, 6 (1975); *Dixon v. Southern Pacific Transp. Co.*, 579 F.2d 511, 513-14 (9th Cir. 1978); *Skill v. Martinez*, 677 F.2d 368, 371 (3d Cir. 1982); and *Charm Promotions, Ltd. v. Travelers Indemnity Co.*, 489 F.2d 1092, 1095-96 (7th Cir. 1973), *cert. denied*, 416 U.S. 986, 94 S.Ct. 2390, 40 L.Ed.2d 763 (1974) (Certiorari denied in similar case where the Seventh Circuit stated: "We hold that a trial judge's ex parte communication with the jury after it has begun its deliberations is not per se reversible error, but is controlled by F.R. Civ. P. 61." 489 F.2d at 1096).

This standard conforms to common sense. If all ex parte communications were "presumed" prejudicial, then mere pleasantries shared by the judge with a jury in the courthouse cafeteria or elevator would be deemed reversible error. Also, if all ex parte communications were "presumed" prejudicial, how could the court determine which side was prejudiced by the communication? This case is a good example. It is just as likely here that ex parte comments by the magistrate prejudiced the defendants as the plaintiff. In fact, immediately upon returning to the courthouse after the jury view, plaintiff's counsel in his comments to the court admitted that he did not know if the magistrate's conduct prejudiced his case:

> "I don't know what he said. I'm not sure what all went on. I now, in retrospect, wish I did take the court reporter. That is my fault, not yours. I guess, for the record, I should move for a mistrial, on the grounds

> that evidence has been taken out of the presence of the court by the jury. I don't know that it's—the problem is I don't know if it's prejudicial." [R.T. 806]

At another point, referring to the comments of the magistrate, petitioner's counsel said, "It swings both ways, in terms of the plaintiff and the defense." R.T. 869. Consequently, although petitioner himself does not know who, if anyone, was prejudiced by the alleged remarks, he wants this Court to presume he was prejudiced solely because he lost the trial.

II.

Petitioner Concedes, as Both the District Court and the Court of Appeals Have Found, That He Waived Any Misconduct.

Petitioner concedes that he waived the presence of a reporter at the viewing, Petitioner's Brief for Certiorari at 28-29, and for the first time now concedes that he also abandoned his motion for a mistrial based on alleged misconduct. Petitioner's Brief for Certiorari at 30. Instead, petitioner contends that he waived his mistrial motion in exchange for an admonishment, but the admonishment given, he contends, was insufficient. Petitioner's Brief for Certiorari at 30.

However, if the admonishment was insufficient, petitioner has waived that also, in that:

First, petitioner's counsel did not submit his requested instruction in writing. *See* Federal Rules of Civil Procedure, Rule 51; 9 C. Wright & A. Miller, *Federal Practice and Procedure*, §2552 at 624 (1971).

Second, the court and petitioner's counsel discussed the instruction *and agreed upon* its exact wording two days before it was given. R.T. 869, 1280-83, 1789.

Third, petitioner did not object to the instruction after it was given and before the jury retired as required by the pertinent part of Rule 51 of the Federal Rules of Civil Procedure: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Fourth, after the instructions were given, plaintiff affirmatively stated for the record that he had no objections. R.T. 1818.

Since plaintiff failed to submit a different instruction, failed to object to the instruction when proposed and as given, and failed to object before the jury retired to deliberate, he may not now complain of error in the instruction. *Palmer v. Hoffman*, 318 U.S. 109, 119, 63 S.Ct. 477, 483, 87 L.Ed. 645, 653 (1943); *Mill Owners Mutual Fire Ins. Co. v. Kelley*, 141 F.2d 763, 765-66 (8th Cir. 1944); and numerous other cases.

Finally, in desperation, petitioner contends that no objection to the alleged misconduct was necessary. Petitioner relies upon Rule 605 of the Federal Rules of Evidence:

> "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point."

Petitioner contends that since the magistrate was acting as the judge during the jury view no objection to the magistrate's conduct was necessary. However, this ignores the rationale for the Rule. The Advisory Committee's Note states:

> "The rule provides an 'automatic' objection. To require an actual objection would confront the opponent with the choice between not objecting, with the result of allowing the testimony, and objecting, with the probable result of excluding the testimony but at the price

of continuing the trial before a judge likely to feel that his integrity had been attacked by the objector."

Here, the trial was being conducted by Judge Keep; accordingly, by objecting to Judge Keep about the magistrate's conduct, petitioner did not run the risk of "continuing the trial before a judge likely to feel that [her] integrity had been attacked by the objection." Moreover, petitioner obviously did not feel any reluctance to object because he moved for a mistrial immediately upon return to the courthouse from the jury view. R.T. 805-06.[1]

Here, petitioner not only objected but also discussed the point at length with the court. In other words, Rule 605 is inapplicable not only because the purpose for the rule is not in issue (namely, by objecting petitioner did not have to attack the integrity of the judge), but also because petitioner did not fail to object but instead discussed the issue with the court and affirmatively *waived* the alleged error in favor of an admonition and the continuance of the trial. Remember, no defense evidence had been presented up to that point. Petitioner made a tactical decision to continue the trial and he should not now be permitted to complain.

Conclusion.

In determining whether an error is prejudicial, the entire record must be considered and the probable effect of the error determined in the light of all the evidence. *Kotteakos v. United States*, 328 U.S. 750, 762, 66 S.Ct. 1239, 1246, 90 L.Ed. 1557, 1565 (1946); 11 C. Wright & A. Miller, *Federal Practice and Procedure*, §2883 at 278 (1973). In

---

[1]Contrary to the implication in petitioner's brief, *Kennedy v. Great Atlantic & Pacific Tea Co.*, 551 F.2d 593 (5th Cir. 1977), does not support his contention that no objection is necessary. As the opinion shows, the complaining party there did object to the judge's law clerk being permitted to testify. *Id.* at 598-99.

ruling upon petitioner's motion for a new trial, the district court weighed the evidence as a whole and stated:

> "I would point out that neither negligence nor unseaworthiness were proved by a preponderance of the evidence. There is no substantial evidence in the record that there was anything, oil or water, on the steps, and defendant indeed put on evidence, the testimony of the two police officers, and Mr. LoCoco, to say that there was no grease or any other foreign substance on the ladder on the day the accident took place.
>
> Plaintiff did put on a mechanical engineer who felt basically that there was insufficient heel room on the ladder that caused the accident and made that evaluation both from the surface of the steps and the angle of the steps, and the width of them, and also including the tread. However, in this particular case defendants put on several experts who testified that the design of the ladder satisfied the standard of care, and this was in view of heel space, angle, surface material, etc.
>
> [Furthermore] there is no substantial evidence that any lack of maintenance contributed to the accident in this case." R.T. 1854.

The entire transcript reflects overwhelming evidence in support of the jury verdict with virtually no evidence supporting petitioner's case.

Secondly, there is no evidence that the magistrate committed any error during the jury view. Although petitioner states that the magistrate did not read the prepared statement, petitioner's counsel at the trial admitted that the statement was "ad libbed." R.T. 805. Counsel also stated on the same day as the jury view that, "I know he [the magistrate] did nothing intentionally malicious to anybody for any reason, but I am concerned that he [the magistrate] may have made statements." R.T. 805. In short, there is no evidence the magistrate said something erroneous.

Third, there is no evidence that any error, if committed, was prejudicial to petitioner. In fact, petitioner's counsel during the trial on the same day as the jury view stated, "I guess, for the record, I should move for a mistrial, on the grounds that evidence has been taken out of the presence of the court by the jury. I don't know that it's—*the problem is I don't know if it's prejudicial.*" R.T. 806.

Fourth, petitioner withdrew his motion for a mistrial saying, "Que sera, sera, what will be, will be. Let's go forward. I withdraw my motion for a mistrial on the record." R.T. 868.

Fifth, petitioner then sought an admonishment to be given as part of the jury instructions, R.T. 868-69; and after the wording was discussed, petitioner agreed to the instruction before it was given, R.T. 869, 1280-83, and did not object to it after it was given. R.T. 1818.

In summary, the evidence supporting the verdict is overwhelming and as the trial court stated in ruling upon petitioner's new trial motion:

> "After the trip to the boat, Mr. Harrison (petitioner's attorney) did demand a mistrial . . . . [Later] the plaintiff's counsel stated, 'Que sera, sera; what will be, will be. Let's go forward. I withdraw my motion for a mistrial on the record.' So there was no further inquiry or steps taken at that time to determine what, if anything, was said by the magistrate as it might have had a bearing on the facts of this particular case . . . . The withdrawal of the motion for new trial is an indication of plaintiff's estimate of the prejudicial value of the conduct, and therefore a significant factor in the appraisal of the degree to which the proceedings deviated from the standards of justice . . . . In sum, as to the allegations of the magistrate's misconduct, under *Dixon*, the plaintiff has failed to show how the improper com-

> munications affected the substantial rights of the parties. First, it is speculative as to what was stated and what effect it had, if any, on the jurors' determination. Secondly, any misconduct, were there any, was waived . . . ; and, third, assuming that there was some misconduct, I do find that it was cured by the instruction that was given." R.T. 1847-48.

The Ninth Circuit agreed and petitioner's brief contains nothing this Court has not ruled upon in the past.

Dated: January 12, 1984.

Respectfully submitted,

LILLICK, MCHOSE & CHARLES,
DONALD F. WOODS, JR.,
By DONALD F. WOODS, JR.,
Attorneys for Respondent,
Gina Karen Fishing, Inc.